Supreme Court, U.S.
FILED
NOV 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-482

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATCHOGUE NURSING CENTER, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Case v. *Weinberger*, 523 F.2d 602	5
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532	4
Mathews v. *Eldridge*, 424 U.S. 319	4, 6
Northlake Community Hospital v. *United States*, 654 F.2d 1234	5
Town Court Nursing Center, Inc. v. *Beal*, 586 F.2d 266	5
Constitution, statutes and regulations:	
U.S. Const. Amend. V (Due Process Clause)	1, 3, 4
42 U.S.C. 1395aa	2
42 U.S.C. 1395cc(b)	2
42 U.S.C. 1395cc(f)	2
42 U.S.C. 1395cc(f)(1)(B)	2
42 U.S.C. 1395cc(f)(2)	3, 4
42 U.S.C. 1395cc(f)(3)	4
42 U.S.C. 1395ff(c)	3, 5
42 C.F.R. 405.1101-405.1137	2
Miscellaneous:	
H.R. Rep. 96-1167, 96th Cong., 2d Sess. (1980)	4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-482

PATCHOGUE NURSING CENTER, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that the Due Process Clause requires that a Medicare/Medicaid provider be afforded a full adversarial evidentiary hearing before being temporarily banned from participation in those programs for noncompliance with regulatory standards.

1. a. Petitioner, a nursing home located in New York, has provided services under the Medicare and Medicaid programs since 1977. In January 1985, the New York State Department of Health (DOH)

conducted a compliance survey at petitioner's facilities (see 42 U.S.C. 1395aa). Based on the data obtained in that survey, DOH concluded that petitioner's dietetic services were not in compliance with federal regulations (42 C.F.R. 405.1101-405.1137). DOH notified petitioner of the deficiencies, warning that failure to correct the deficiencies would jeopardize its status as a provider under Medicare and Medicaid (42 U.S.C. 1395cc(b) and (f)). Petitioner was requested to submit a plan to bring itself into compliance with regulatory standards (Pet. App. 32a). In a second survey in March 1985, DOH found that petitioner was still not in compliance. After petitioner was again informed of the deficiencies, it submitted a plan of correction that DOH found unacceptable. Pet. App. 33a.

In June 1985 DOH apprised the Secretary of Health and Human Services of petitioner's noncompliance and recommended that petitioner be sanctioned. Pet. App. 33a. DOH did not recommend that petitioner receive the maximum statutory sanction—termination as a Medicare and Medicaid provider (42 U.S.C. 1395cc(b)). Rather, DOH recommended that the Secretary impose the lesser sanction of temporarily banning petitioner from receiving reimbursement for new Medicare and Medicaid admissions, a ban that would stay in effect until petitioner corrected the deficiencies. See 42 U.S.C. 1395cc(f).[1] The Secretary informed petitioner that

[1] Where, as here, a skilled nursing facility's noncompliance with regulatory requirements does not immediately jeopardize the health and safety of its patients, the Secretary may either terminate the facility's certification or temporarily preclude reimbursement for new patients to the facility until compliance is achieved. 42 U.S.C. 1395cc(f)(1)(B). Where the

it could request an informal hearing, before the imposition of a temporary ban, at which petitioner would have the opportunity to present evidence challenging the finding of noncompliance. Pet. App. 33a; see 42 U.S.C. 1395cc(f)(2).

An informal hearing was held in July 1985. Petitioner asserted that it was adhering to the regulations, accused DOH of incompetence and prejudice, and requested that another survey of its facilities be conducted. Pet. App. 33a. Petitioner's request was granted, and DOH conducted a third survey and found for the third time that petitioner fell short of the regulatory standards. Pet. App. 33a-34a. HHS once again notified petitioner that under the statute it was entitled to an informal hearing before being banned. Another hearing was held at which HHS concluded that petitioner had not complied with federal regulations. As DOH had recommended, the Secretary banned petitioner from receiving reimbursement for new Medicare and Medicaid admissions until it satisfies program requirements. *Ibid.*

b. Petitioner brought this action in the United States District Court for the Eastern District of New York seeking to enjoin the Secretary from banning petitioner from program participation without conducting a full evidentiary hearing. Petitioner argued that a full adversary hearing was required by the statute, or, alternatively, by the Due Process Clause. In denying petitioner's motion for a pre-

---

lesser sanction is imposed, termination will become mandatory if the facility fails to achieve compliance within eleven months. 42 U.S.C. 1395cc(f)(3). The statute provides for a full evidentiary hearing after termination. 42 U.S.C. 1395ff(c).

liminary injunction, the district court reasoned that petitioner had not shown a sufficient likelihood of success on the merits (Pet. App. 25a-28a). The court of appeals unanimously affirmed (*id.* at 29a-47a), holding that 42 U.S.C. 1395cc(f)(2) requires only an informal pre-sanction hearing and that such a hearing satisfies the Due Process Clause.

2. The court of appeals' decision affirming the denial of a preliminary injunction is correct. Petitioner does not allege, nor is there, a conflict among the circuits or with any decision of this Court. Further review is unwarranted.

The petition presents only the constitutional issue decided below: whether the Due Process Clause requires a full evidentiary pre-sanction hearing. As the court of appeals noted (Pet. App. 45a), petitioner's position on this issue is inconsistent with this Court's recent statement that, "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 545 (1985), quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976). Petitioner's contention also disregards the function of the particular sanction in the statutory scheme. Congress empowered the Secretary to implement a temporary ban on reimbursement to noncompliant providers as an alternate remedy short of complete termination. See H.R. Rep. 96-1167, 96th Cong., 2d Sess. 55-58 (1980). An administrative ban is an intermediate sanction that lasts only until the provider cures its deficiencies. 42 U.S.C. 1395cc(f)(3). If the provider fails to measure up to program standards within eleven months after the ban is imposed, the provider is then terminated

(*ibid.*). The statutory scheme thus evidences Congress's intent that the power to ban be used to encourage noncomplying providers to make corrections promptly and thereby avoid termination. See H.R. Rep. 96-1167, *supra*, at 56-57. This goal of encouraging prompt compliance would be thwarted if the formal procedures petitioner urges were required before the Secretary could seek to remedy noncompliance by banning a provider.

In any event, as the court of appeals stated (Pet. App. 45a), petitioner has no basis for challenging the process that it in fact received. Petitioner had the benefit of two informal hearings at which it presented oral and written arguments challenging the DOH surveys. Throughout the administrative stages there was considerable informal communication between petitioner and DOH. And, of course, should petitioner fail to cure its deficiencies and eventually be terminated from the programs, it will then be entitled under 42 U.S.C. 1395ff(c) to a full evidentiary hearing.[2] The court of appeals was correct in concluding (Pet. App. 44a-45a) that the procedures provided under the statute and afforded petitioner in

[2] Other courts of appeals have stated that, in light of the post-sanction evidentiary hearing mandated by 42 U.S.C. 1395ff(c), due process does not require a full evidentiary hearing before a provider is terminated. *Northlake Community Hospital* v. *United States*, 654 F.2d 1234, 1241-1244 (7th Cir. 1981); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266, 273-278 (3d Cir. 1978) (en banc); *Case* v. *Weinberger*, 523 F.2d 602, 606-609 (2d Cir. 1975). Since the Constitution does not require a full hearing before the Secretary imposes the more severe sanction of termination, there is no basis for petitioner's contention that a formal evidentiary hearing must precede the intermediate curative step of banning a noncomplying provider until its deficiencies are remedied.

this case satisfy the due process standards set forth by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40113